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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Case No. 78-1573

JOHN JOHNSON,

Petitioner,

—v.—

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BERNARD A. BERKMAN
BERKMAN, GORDON, KANCELBAUM,
LEVY and MURRAY
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 781-5245
Attorney for Petitioner

GEORGE W. PALDA
J. MICHAEL MURRAY
Of Counsel

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

Case No. _____

JOHN JOHNSON,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio dismissing petitioner's appeal for want of substantial constitutional question. The dismissal of petitioner's appeal by the Ohio Supreme Court thereby affirmed the judgment of the Ohio Court of Appeals - Eighth District, which had affirmed petitioner's convictions of aggravated murder, kidnapping and rape.

OPINIONS BELOW

The judgments of the Ohio Supreme Court dismissing petitioner's appeal and denying rehearing are unreported and are set forth, respectively, in the

separately bound Appendix at A3, A2. The judgment and opinion of the Ohio Court of Appeals - Eighth District, is unreported and is set forth in the Appendix at A4-36. The journal entry of the Court of Common Pleas, Cuyahoga County, Ohio, the trial court in this case, is set forth in the Appendix at A53-54.

JURISDICTION

The judgment of the Ohio Supreme Court dismissing petitioner's appeal as of right was issued on November 9, 1978, Appendix at A3. Petitioner's motion for rehearing was denied by the Ohio Supreme Court on December 4, 1978, Appendix at A2. On February 15, 1979, Mr. Justice Stewart, upon application by petitioner, granted an order extending the time within which to file a petition for a writ of certiorari to and including April 14, 1979, Appendix at A1.

This petition seeks review of a final judgment rendered by the Ohio Supreme Court, the highest court in the State of Ohio in which a decision could be had. This Court has jurisdiction pursuant to 28 U.S.C. §1257(3) because rights, privileges and immunities under the Constitution of the United States are claimed to have been violated.

QUESTIONS PRESENTED FOR REVIEW

I.

In a state criminal trial, is a trial court required by the Due Process Clause of the Fourteenth Amendment to

grant a change of venue or a continuance where the reasonable likelihood that prejudicial pretrial publicity will prevent a fair trial is demonstrated: (1) by voir dire examination of jurors in which a substantial number of prospective jurors admit bias or are shown to be biased and (2) by affirmative proof of the prejudicial publicity, much of which has been induced by law enforcement officials and which has included attacks on the defendant's character, inaccurate and totally untrue information, evidence never offered at trial and facts which would have been inadmissible at trial?

II.

Is a warrantless search of a locked automobile which is parked in front of the home of the owner justified on the basis of the owner's consent where the search is conducted late at night, by a group of armed, uniformed police who state they are on official business, who fail to advise the owner, roused from sleep, that he may demand a search warrant and the owner simply does not resist the directives of the police? Or, is a search and seizure under these circumstances violative of the Fourth and Fourteenth Amendments?

III.

If at the time of a warrantless arrest of an accused, the only facts which were available to the arresting officers concerning the accused connected the automobile belonging to the accused to an alleged criminal incident separate from that for which the accused was arrested, but the facts also indicated

that someone other than the accused was involved in the separate incident, is there probable cause for an arrest for any crime and, if not, were statements and any other evidence obtained as a direct result of continuous interrogations from the time of arrest acquired in violation of the Fourth and Fourteenth Amendment rights of the accused?

IV.

Is the warrantless seizure of an arrestee's automobile which is parked a quarter of a mile from the location of the arrest, on private property, in the lawful custody of another, an unconstitutional seizure and are warrantless searches and seizures of the contents of the seized car, conducted approximately seven and fourteen hours after the initial seizure of the car, also violative of the Fourth and Fourteenth Amendments?

V.

Where an affidavit in support of a search warrant, drafted with the assistance of a lawyer, contains conclusory statements which are essential to any attempted showing of probable cause and which are attributed to a named informant, but the affidavit fails to set forth any facts concerning the underlying circumstances from which the informant reached his conclusion and there are no facts in the affidavit to show that the informant was credible or his information reliable and, further, facts are set forth which have no seeming connection to the establishment of probable cause and no facts to explain their connection are supplied, does the

affidavit fail to set forth sufficient facts to enable a magistrate to find probable cause, and is a search of a residence pursuant to a warrant, violative of the Fourth and Fourteenth Amendment rights of the occupants?

VI.

Should a search warrant have been voided because false statements had been included in a warrant affidavit with reckless disregard for the truth where the affiant testified at an evidentiary hearing that, at the time he drafted the affidavit with the aid of a county prosecutor and included an informant's statement concerning an attempted abduction which was essential to establish probable cause, the affiant knew that the location of the attempted abduction was one to one and one-half miles from where the murder victim had disappeared and that the attempted abduction had occurred at least one-half hour before the murder victim's disappearance, but the affidavit as drafted claimed that the abduction occurred "at or near the area" and "at or near the time" of the murder victim's disappearance so that it appeared on the face of the affidavit that the murder victim was the victim in the attempted abduction?

VII.

Where after a defendant is subjected to lengthy, continuous, night-time, custodial interrogation, statements are obtained from the defendant and the question of whether the defendant was adequately advised of his rights is hotly disputed in the record, has the

State failed to satisfy its burden of proving a voluntary, knowing and intelligent waiver of defendant's rights under the Fifth and Fourteenth Amendment?

VIII.

Was a defendant denied his rights to counsel and due process of law in violation of the Sixth and Fourteenth Amendments where defendant was arrested and subjected to lengthy, continuous, custodial interrogation and the interrogating officers took affirmative steps to persuade defendant's wife, who had appeared at the police station, not to get an attorney for defendant by advising the wife that there was no reason to secure an attorney, that she would be advised when an attorney was needed and that defendant would be released as soon as he made a statement when the officers knew that defendant was a suspect and was being interrogated as such?

IX.

Where, in a post-indictment interrogation, a defendant clearly states to the interrogating officer that he will make no statements without his attorney present, the defendant has clearly invoked his Sixth Amendment right to assistance of counsel and an oral statement obtained immediately following the expressed desire for the assistance of counsel, was the statement obtained in violation of defendant's Sixth and Fourteenth Amendment rights?

X.

Where, in a post-indictment interrogation, a defendant states unequivocally that he will not make any statement without his attorney present, the interrogation must immediately cease and where a statement is obtained after the request for the presence of an attorney, the statement must be suppressed under the rule established in Miranda v. Arizona, 384 U.S. 436 (1966).

XI.

Are a defendant's rights to assistance of counsel and due process of law violated by the admission at trial of a witness's testimony concerning pre-trial, post-indictment identification of the defendant which was conducted in the absence of defendant's court-appointed counsel, and by testimony concerning an in-court identification where no showing was made that the in-court identification was based on observations other than at the pre-trial, post-indictment identification and where prior to viewing the defendant at the pre-trial showup, the witness, a twelve-year-old child, was told by police, among other things, that the defendant had already been picked out by other children?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the Fourth, Fifth and Sixth Amendments and the pertinent portion of the Fourteenth Amendment to the United States Constitution are set forth in the Appendix at A76-77. The text of Ohio Revised Code §§2905.01, 2907.02, 2903.01 and 2945.59 are set forth in the Appendix at A78-82.

STATEMENT OF THE CASE

Petitioner John Johnson was convicted on March 6, 1976, of the kidnapping, rape and aggravated murder of Melissa Hinke by a jury in the Common Pleas Court of Cuyahoga County, Ohio. The trial court imposed consecutive sentences of seven (7) to twenty-five (25) years for the counts of kidnapping and rape, and for the count of aggravated murder, the court imposed a sentence of death. The judgment and sentence of the trial court were affirmed by the Ohio Court of Appeals - Eighth District. While petitioner's appeal to the Ohio Supreme Court was pending, the Ohio Supreme Court modified the sentence of death to life imprisonment, in response to rulings by this Court that the Ohio statutory regime for imposing capital punishment was unconstitutional.[1]

The Ohio Supreme Court subsequently dismissed petitioner Johnson's appeal for want of substantial constitutional question.

On Thursday, November 20, 1975, Melissa Hinke, eight years old, left her home on West 67th Street in Cleveland, Ohio, to buy a half-gallon of milk at a nearby store (4T.1831-1832).[2]

1/ Lockett v. Ohio, ____ U.S. ____, 98 S.Ct. 2954 (1978).

2/ All references to the transcript of the proceedings in the trial court will be referred to by the volume number, the letter "T" and page number(s) in the transcript.

She left her home at approximately 3:10 p.m. (4T.1836) with two quart-size Pepsi Cola bottles, and some change with which to purchase the milk (4T.1832, 1842), and never returned (4T.1841). Two days later, on Saturday morning, November 22, her body was found in a wooded area (4T.1993) of the Metropolitan Park System's Rocky River Reservation (4T. 1989).

Soon after the victim's disappearance, the news media devoted extensive coverage to the search for the missing girl and each succeeding event.[3] The very day the body was found, Cleveland newspapers began to focus upon the grisly and brutal aspects of the crime and the investigation which supposedly connected Johnson to the crime (MA2, B3, 4). Front page and lead story coverage continued throughout the investigation. By the time of Johnson's arraignment on November 28, 1975, the community was flooded with details of the "evidence" of Johnson's "guilt", much of which was inaccurate, inadmissible and never offered at trial (e.g., MA4, 5, 7, C1, E1, D17-18).

John Johnson was in police custody when Melissa Hinke's body was found (2T.1106). Police had arrested Johnson, without a warrant, at about 7:00 p.m. of the prior evening (3T.1243, 1337), and various teams of police had

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3/ All references to media coverage will be to Petitioner's Venue Motion Exhibits filed with the trial court and will be referred to by the letter "M" followed by the letter and number identifying the exhibit.

interrogated him almost continuously (2T.1103, 3T.1253, 1287, 1348-1349), without the presence of an attorney, until shortly after the victim's body was found. During this overnight period of interrogation, police obtained oral and written statements from Johnson.

Even before discovery of the body, police had conducted three warrantless searches of Johnson's automobile (2T. 993-994, 3T.1294-1310). The first search (for which the sole justification urged by the State was consent (2T.963-964)) was conducted by four uniformed police, shortly after midnight on November 21, 1975, in front of the petitioner's apartment (2T.980, 1035, 3T.1336). The other two warrantless searches were conducted by detectives while Johnson was in custody and after Johnson's car had been seized without a warrant (3T.1251), at a gas station about a quarter of a mile from where Johnson had been arrested (3T.1263).

After discovery of the body, Johnson's home was searched under color of a search warrant (2T.1142). During this same period, in connection with the Hinke investigation, police interviewed as possible identification witnesses children and adults who had been confronted or approached by male drivers of automobiles.

Johnson was indicted on November 25 and arraigned on November 28, 1975. Upon a showing of indigency, the court appointed defense counsel to represent him. Immediately after his arraignment, Johnson was taken by detectives from the courtroom to a room in the police

station (2T.1086) where, without an attorney present (2T.1097), while surrounded by police and detectives and dressed in prison clothes (2T.863), he was viewed by identification witnesses (2T.1092-1093) and further interrogated (2T.1095-1096). A highly incriminating oral statement was obtained from Johnson during this interrogation.

At trial, the State offered into evidence a semen-stained towel (SX12) and a blue sweatshirt spotted with blood (SX9-H) which had been seized during the warrantless searches of the petitioner's car. Also received in evidence was a penknife with specks of blood on it (SX1). The penknife had been seized while Johnson was in custody, following the warrantless seizure of Johnson's automobile. From the search of Johnson's home, the State offered a pair of undershorts (SX8-K) and a washrag (SX25-E) which were stained with blood. Extensive testimony was elicited concerning the seizure and testing of these items (3T. 1628-1638, 1653-1656, 1659-1675, 1687-1689, 1692-1695, 4T.2230-2243, 2252-2253, 2257-2261). Some of the testimony established that the blood on the undershorts was not the petitioner's blood-type, but matched the victim's blood-type.

Four detectives testified at trial about the statements obtained from John Johnson during custodial interrogations on November 22 and 28, 1975. The jury also heard "prior acts" testimony (Revised Code §2945.59, Appendix at 82) by three young girls concerning alleged attempts by a man, who the State urged was Johnson, to entice the girls into

his car. Included in the "prior acts" evidence was the testimony of twelve-year-old Lisa Chambers concerning her police station show-up identification of Johnson on November 28, 1975, immediately following his arraignment, without the presence of his court-appointed attorneys. Lisa Chambers also made an in-court identification of the petitioner as the man who talked to her.

Despite clear evidence shown by the defense in motion exhibits[4/] as well as in the voir dire of prospective jurors of the prejudicial effect of the massive barrage of pretrial publicity, a pretrial motion by the defense for change of venue and/or continuance was overruled (Appendix at A56, 2T.783-784). The motion for change of venue and/or continuance was renewed later at trial and again was overruled (5T.2466, 2470).

Pretrial motions to suppress the evidence obtained from the searches and seizures detailed above because of the violation of petitioner's Fourth and Fourteenth Amendment rights were overruled by the trial court (Appendix at A55, A57-58). Similarly, motions to suppress the custodial interrogation statements of the petitioner because they were obtained in violation of petitioner's Fourth, Fifth, Sixth and Fourteenth Amendment rights were overruled by the

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4/ Prior to voir dire, stipulations were entered into the record concerning the circulation of the newspapers and the accuracy of copies of newspaper articles and television scripts submitted by the defense.

trial court (Appendix at A55, A58-61), as was a motion to suppress the identification testimony of Lisa Chambers concerning a "prior act" (Appendix at A55-62).

All of the subjects of the pretrial motions were asserted in the assignments of error lodged with the Ohio Court of Appeals - Eighth District (Appendix at A51-52). After the court of appeals in its opinion of Janaury 30, 1978, affirmed petitioner's convictions (Appendix at A4-36), petitioner timely applied for rehearing and urged that the issues raised under the United States Constitution required reversal and that the court of appeals should consider issues which it failed to address in its opinion, including the constitutional validity of identification testimony of Lisa Chambers (Appendix at A37-45). However, rehearing was denied by the court of appeals without elaboration (Appendix at A46).

Petitioner next turned to the Ohio Supreme Court and again raised the same Fourth, Fifth, Sixth and Fourteenth Amendment claims in the Propositions of Law submitted in his brief in support of appeal as had been raised before trial court and the court of appeals (Appendix at A47-50). However, the Ohio Supreme Court, without opinion, dismissed petitioner's appeal for want of substantial constitutional question (Appendix at A3) and, subsequently, denied petitioner's application for rehearing (Appendix at A2).

REASONS FOR GRANTING THE WRIT

I.

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER A CHANGE OF VENUE OR CONTINUANCE IS REQUIRED WHERE THE REASONABLE LIKELIHOOD THAT PREJUDICIAL PRETRIAL PUBLICITY WILL PREVENT A FAIR TRIAL HAS BEEN SHOWN BY THE VOIR DIRE EXAMINATION OF THE JURORS AND BY AFFIRMATIVE PROOF OF PREJUDICIAL PUBLICITY, MUCH OF WHICH HAS BEEN INDUCED BY LAW ENFORCEMENT OFFICIALS AND WHICH INCLUDES ATTACKS ON THE DEFENDANT'S CHARACTER, INACCURATE AND TOTALLY UNTRUE INFORMATION, EVIDENCE NEVER OFFERED AT TRIAL AND FACTS WHICH WOULD HAVE BEEN INADMISSIBLE AT TRIAL.

The crime with which John Johnson was charged was one of the most sensational and horrifying in the experience of Cuyahoga County, Ohio. During the three-month period between the victim's death and Johnson's trial, the community in which he stood trial for his life was saturated with pretrial publicity of the most prejudicial, hostile and incriminating kind. All of the newspapers and television stations in Cuyahoga County transmitted in lurid and voluminous detail daily news accounts of Melissa Hinke's death, the fears and outrage of her neighbors, the police investigation of John Johnson, the chain of incriminating evidence against him, his partial confession of guilt, details of his character defects, sexual perversions and prior crimes of a violent or sexual nature, as well as prior unrelated violent crimes of members of his family, the opinions of police and public figures, prior to trial, of his

guilt of the sensational kidnapping-rape-murder. Deputy Coroner Lester Adelson was quoted by the media as saying that the killing was "one of the most disturbing cases I've handled" in 25 years as coroner (M. A3, A7, B19, D1, F4).[5] The media frequently referred to the fear and anger of the residents in the community. For example, a television film report included the following exchange from a resident: "It is awful, it is terrible, a young girl like that...Someone should do the same thing to him." (1T.630-631. See also M. A3, A14-15, C103, D18-19, E11-12, 19-20, F15).

Both Cleveland newspapers carried the case as a headline or front-page story for a full week following the disappearance of Melissa Hinke (M. A1-4, A7, A12, B1-5, B7, B9). Cleveland's three television stations devoted large segments of air time to the details of the crime. Every news show for a complete week, often as the lead story (M. D7, D9, D11, E8, E16, E19, E22, E27, F3, F6, F9), carried news of the crime and the police investigation focused upon John Johnson. Film reports included scenes of Johnson's appearances in court, surrounded by police and sheriff's deputies (M. D13-15, D21, E4-6).

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[5] All references to the Petitioner's Venue Motion Exhibits will hereinafter be referred to as "M" followed by the letter and number(s) identifying the exhbit.

Newspaper articles and television reports wove bits of information with rumors and innuendoes to connect Johnson with the crime. On November 24, 1975, the date of the petitioner's preliminary hearing, all three television stations broadcast details of the status of the case. WJW-TV, Channel 8, began its 6:00 p.m. news show by announcing that "police believe they have their man in the brutal murder...." (M. F6). The news report speculated that "whoever abducted the girl probably had cruised this area before." This observation was followed immediately by the comment that the petitioner worked at a neighborhood gas station and was arrested after his license number matched an earlier report of an attempt to lure a little girl into a car. The announcer commented that the petitioner was "isolated" in jail "for his own protection." WEWS-TV, Channel 5, reported that the petitioner was charged with murder, kidnapping and rape, and then stated, "police [are] accusing him of luring Melissa into his car, attacking her, and then stabbing and strangling her to death" (M. E17). In a later WEWS newscast, as the lead story, a picture of the petitioner was displayed on the screen and the announcer stated, "police are saying this man is the one who kidnapped her, raped her, and then killed her. This is John Albert Johnson...." (M. E19).

WKYC-TV, Channel 3, featured a film report of Johnson "as he was being led into the courtoom...." (M. D13-14). The news report stated that the petitioner was ordered held on $750,000 bond and that "then, a curious thing happened. Judge Matia told Johnson, 'May God have

mercy on your soul.'" (M. D14). The newscaster noted that the "comment is usually reserved for cases in which a death sentence has been pronounced...." Channel 3 also reported that Johnson was traced through his license number (M. D15), much like the report on Channel 8. All three of the television stations reported that Johnson's brother was currently in prison for killing a woman (M. D17-18, E17, F6). The Cleveland Plain Dealer also reported this "fact" (M. A5).

The Plain Dealer reported on November 24, 1975, that Johnson became a suspect after he was stopped on the day of the murder "as a suspicious character" (totally unsupported by testimony in the record) and was in "isolation...to protect him from other inmates." (M. A3). On the same date, the Cleveland Press as a front-page story reported that police indicated that petitioner "tried to lure another girl into his car earlier that day." (M. B5). A later edition of the Press, in a front-page story, carried a picture of Johnson and described his appearance in Municipal Court. The article repeated the statement that he was arrested "when police got his license number after he tried to lure another girl into his car" (M. B7). Also included were statements that police "declared they have sufficient evidence to bring [the petitioner] to trial...," that "the suspect allegedly had traces of blood...on his clothing and under his fingernails." The article further detailed the coroner's report that the victim "had been stabbed repeatedly in the face, neck, chest and abdomen. Her face had been battered

with a blunt instrument," and that she had been strangled and sexually molested. Another article in the Press that day reported that the police had said Johnson had "a violent temper when drinking" (M. B15).

On November 25th, the Plain Dealer published a large front-page photograph of the petitioner as he left Municipal Court. The accompanying article repeated the claim of the attempted abduction of another girl and identification through license plates. It also stated that police searched Johnson's apartment and car and "among the items they said they found were a pair of bloodspotted undershorts in the apartment, blood and a semen-stained towel in the car." The article also claimed that a lie detector test was given to the petitioner and he "told police he had been in a Lorain Ave. adult book store earlier Thursday." It further reported that "police said he [Johnson] had magazines portraying nude children in his possession" (M. A4).

The assertion concerning the possession of magazines portraying nude children was totally false. There was absolutely no testimony in the record to substantiate such a statement. Nevertheless, this statement was repeated by much of the media (M. A18, C1, C2, E1). In fact, Channel 5 concluded a November 25th report on the case with the remark that police said the petitioner tried to pick up another child, that police "found pictures of nude children in his home and blood-stained underwear" (M. E1, emphasis added).

A Cleveland Press article on November 25th carried a headline of "Police seek swift indictment of suspect...." After describing the slain girl in her casket, the article disclosed in bold-face type, that "blood-stained undershorts were found in a trash can at [the petitioner's] home," that there was "blood under his fingernails and...a stained towel was found in the auto." It noted that Johnson "explained that the blood was the result of a fight he got into...," that police "placed" the petitioner "in an adult bookstore about two hours before Melissa was kidnapped" and that the petitioner "claimed he had 'popped a pill' that afternoon." (M. B16).

The Plain Dealer, in a front-page story on November 26th, referred to comments by Art Modell, grand jury foreman and Cleveland Browns owner, concerning how disturbing the coroner's testimony in the grand jury had been. The article then proceeded to itemize all the "evidence" gathered to prove the guilt of the petitioner (M. A7). It reported that a police search of Johnson's home "uncovered a blood-soaked penknife...bloody undershorts, work shirt and pants and three wet rags." The article next shifted to the gruesome nature of the slaying: "a piece of blue cloth...knotted so tightly around Melissa's neck that the imprint of a button...was left in the skin." Then shifting back to the police investigation: "Found in Johnson's car, police said, were two empty soft drink bottles, a semen-stained towel, a piece of bloody fingernail, strands of brownish-blond hair and a quart of Lawson Milk Co. milk."

The report remarked, "Melissa had been sent to a Lawson store...." The article stated that "bits of shrubbery" were found in the car, implying that Johnson's car was at the scene of the crime. The article next focused on the petitioner, "in an isolation cell...to protect him from other prisoners...." The paper claimed Johnson had said "I don't remember doing it, if I did it," and that he had "celebrated his birthday" the day of the murder, "by visiting several taverns." Also mentioned was that the appellant "was fined $100.00 in Cleveland Municipal Court for pandering obscenities..." a year earlier. Finally, the article noted that public "sentiment has been growing for Melissa's family," and followed with details of the funeral of the victim.

The article was highly inaccurate, inflammatory and prejudicial. Nowhere in the record is there a shred of testimony concerning a "bloodsoaked" penknife (see 3T.1660-1661, 4T.2240, 2291), or soft drink bottles somehow connected to Melissa Hinke (4T.1882, 5T.2370-2371, 2385-2386), or a "bloody fingernail" (3T.1601, 4T.2221-2224, 2263), or strands of hair belonging to Melissa Hinke (3T.1628-1629, 1643). The alleged statement by Johnson, tantamount to a confession, potentially the most damaging single piece of publicity, is not substantiated anywhere in the record.

Cleveland television stations covered the Hinke funeral extensively. Juxtaposed with the funeral service publicity were stories of petitioner's arraignment. Channel 3 reported that Johnson was "brought to and from court under heavy guard" and that he "has been

kept in a cell by himself because jail officials fear other inmates could try to harm him." The film report also noted that "because the case has stirred such emotion and received heavy news coverage...it is almost certain the trial will be held outside of Cuyahoga County" (M. D20-21).

The Plain Dealer focused further attention on the case by devoting a full page to the case in section one of the Sunday, December 7, 1975, edition. A headline asked the question, "Did porn shops incite killing?" (M. A15). Below the headline, the caption on a photograph of an adult bookstore read:

> "A typical Lorain Avenue smut shop...Police Capt. Jerome Poelking, chief of detectives, says police information is that John A. Johnson, who has been charged with the rape murder of 8-year-old Melissa Hinke, was in a Lorain Avenue porno store...the morning of Melissa's disappearance. A homicide detective said Johnson had looked at pictures of nude children while in the store." (Emphasis added).

On the remainder of the page were letters to the editor, the texts of which were based on the details of the crime which had been publicized by the media. For example, "Johnson reportedly told police he had been in a[n]...adult bookstore...the day of the murder. Police also said he had in his possession magazines portraying nude children."

Intermittent television and newspaper coverage of the case continued until the time of the jury selection (e.g., M. A16-18, B11-14, C2-3, E9-12, E29, F18-20).

On the very first day of jury selection, February 23, 1976, Channel 5 began the first of a series of documentary reports on the subject of child molesting (1T. 350). The first program featured an interview with the victim's mother (1T.351) and contained damaging remarks about Johnson, including that Johnson had committed other crimes of a sexual nature (1T.351), that he had been under surveillance (1T.351), and that he attempted to abduct another girl for sexual purposes (1T.352). Advertisements announcing the start of the series appeared in the Plain Dealer and the Press on February 23, 1976 (1T.351).

The effects of this barrage of publicity were apparent at the voir dire of the jury. Of the forty-two talismen who were questioned in regard to pretrial publicity, eleven persons volunteered, unequivocally, that they could not be impartial as jurors because of bias formed from exposure to such publicity. All but one of the special jury panel admitted exposure to the pretrial publicity and that they had read or seen news reports about the case. Even after a court admonition against reading any newspapers or monitoring radio or television news programs, almost one-third of the panel admitted further exposure, either deliberate or inadvertent, to news media stories about the trial. In total, almost 40 percent of the entire panel of prospective

jurors questioned were dismissed on the basis of some taint as to their inability to try the accused impartially. In their effort to empanel a fair jury, defense counsel exhausted all of their peremptory challenges.

During the course of the trial and hearings on pretrial motions, the courtroom was filled with spectators. In order to obtain seating, prospective spectators were searched for weapons by sheriff's deputies stationed outside the courtroom doors. Because of crowded conditions in the courtroom, a table was provided for the press inside the rail separating the trial working area from the spectator section (5T.2467). During the voir dire, a news reporter copied, and used in a highly prejudicial news story (1T.354-355, and see M. A18), a confidential psychiatric report on the sanity of the accused which he took without authorization from the private desk area of the judge's bench.

Ultimately, because of the unrelenting barrage of publicity, the trial court sequestered the jury. But the damage had been done.

Although trial courts have initial discretion to determine whether a change of venue or continuance should be granted in a criminal case, such discretion is limited by constitutional imperative, "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial...." (Emphasis supplied). Sheppard v. Maxwell, 384 U.S. 333, 362-363 (1966); accord, Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963);

Irvin v. Dowd, 366 U.S. 717 (1961). Under such circumstances, grant of change of venue or continuance is constitutionally compelled. Sheppard v. Maxwell, supra. Here, the invidious effect of pretrial publicity was shown both by lodging copies of the newspaper articles and television scripts with the court, and by voir dire examination of the prospective jurors.

Furthermore, the record can fairly be read as revealing a trial judge more concerned with orchestrating a voir dire designed to gloss over the problem of pretrial publicity than he was with probing deeply so that the effect of the publicity could accurately be gauged. For example, the trial judge posed leading questions to potential jurors designed to elicit statements of their ability to be impartial (See 1T.42-44, 47-50, 62). When defense counsel asked the court to excuse two jurors who had evidenced bias due to the massive publicity, the trial judge accused defense counsel of posing questions designed to confuse the jurors (1T.291-297). The court then posed additional leading questions to those jurors designed to cause them to recant their previous testimony (1T.297-303).

> "To deny that bludgeoning or poisonous comment has power to influence or at least to disturb the task of judging is to play make believe and to assume that men in gowns are angels. The psychological aspects of this problem become particularly pertinent in the case of elected judges with

> short tenure." Pennekamp v. Florida, 328 U.S. 331, 359 (1956) (concurring opinion).

In overruling this assignment of error, the court of appeals relied principally upon Murphy v. Florida, 421 U.S. 794 (1975). However, the facts presented in Murphy are easily distinguishable from those presented here. The Court in Murphy emphasized that most of the jurors had only a vague recollection of any publicity concerning the accused and many jurors considered the publicity irrelevant, 421 U.S. at 800-801. This is in sharp contrast to the profound effect the publicity had upon prospective jurors in this case. Furthermore, the Murphy court stated that it is necessary to "distinguish between mere familiarity with [the accused] or his past [as in Murphy] and an actual predisposition against him, just as we have in the past distinguished largely factual publicity from that which is invidious or inflammatory." 421 U.S. at 800, n. 4 (see, also, 421 U.S. at 802). In the instant case, thirteen prospective jurors demonstrated a clear bias toward Johnson as a result of publicity directed to this case. Moreover, this case presents vivid evidence of publicity which was invidious and inflammatory.

The publicity surrounding this trial focused on and pointed a guilty finger at the petitioner; it included vicious attacks upon his character; it included inaccurate and totally untrue information; it reported evidence that was never offered at trial; it reported evidence that would have been inadmissible had it been offered at trial,

much of it was induced by law enforcement officials; all of it was untempered by cross-examination. This case presents a ripe opportunity for the Court to reaffirm and clarify a trial court's duty to effect adequate prophylactic measures against prejudicial pretrial publicity in order to assure an accused a fair trial before an impartial jury. Petitioner respectfully urges the Court to grant certiorari and reverse his conviction.

II.

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER PETITIONER'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE INTRODUCTION AT TRIAL OF EVIDENCE SEIZED DURING A WARRANTLESS MIDNIGHT SEARCH OF PETITIONER'S AUTOMOBILE WHERE THE RECORD SHOWS MERE ACQUIESCENCE TO AUTHORITY RATHER THAN CONSENT.

Shortly after midnight (2T.980, 1035, 3T.1336), on November 21, 1975, police officers Hanton, Charvat, McGuire and Wayne (2T.972) approached John Johnson's apartment at 2006 West Boulevard in Cleveland and knocked on the door (2T.696). They were investigating the Melissa Hinke case (T.979, 1031) and had been requested to check out Johnson's auto in regard to that case (2T.967).

All four of the police gathered in the hallway outside of John Johnson's apartment door (2T.983). Charvat knocked on the door for a period estimated to be less than one minute (2T.983). Johnson had been in bed for approximately

one hour (3T.1333). Prior to that time, he had not slept for thirty hours (3T. 1334). He got out of bed and answered the door (3T.1334); he was dressed in a T-shirt and undershorts (2T.983), and appeared to have been sleeping (2T. 984).

When Johnson, a short man of small, thin build (3T.1411), opened the door to his apartment, four armed, uniformed policemen were standing there (2T. 985, 3T.1334). Their uniforms, badges and guns were plainly visible (2T.981-982, 1036, 3T.1334). One of the police officers was very tall and two others were of medium build. An older man, wearing glasses, appeared to be in charge (3T.1410). Either Charvat or Hanton (2T.1038, 970) announced that they were on official business (2T.1038); they wanted to talk to him (2T.970).

After Johnson got dressed, he was told that they all had to go outside to his car (2T.989, 1039-1040, 3T.1335, 1377). On the way to the car Officer Hanton made it plain to Johnson that he wanted to look in the interior of the car (2T.992, 3T.1378). Sometime before reaching the car, one of the policemen told Johnson to open the trunk of his car (2T.1040).

All the police walked to the car with appellant, grouped all around him (2T.1040), some in front, some alongside and behind him (2T.993). They remained in close proximity to Johnson throughout the search (2T.1040, 1042). Hanton and McGuire claimed that the police asked the appellant to open the car (2T.994, 1041). Johnson testified that

he was told to open the car door (3T. 1335, see also 1384); the police instructed him what to do (3T.1378), and he complied (3T.1335, 1337, 1410).

On intense cross-examination, Johnson maintained consistently that he did not give permission but was instructed and simply did not resist (3T.1378, 1383, 1387). He testified that "you don't go around telling a law officer you are not going to do this" (3T.1415). Johnson was never advised that he could refuse the search and demand a warrant (2T.997-998, 1039, 3T.1336-1337).

Once the doors were opened, Hanton and McGuire went inside (2T. 994) and searched the car with flashlights (3T.1382). Hanton determined what was to be taken (2T.998, 1044, 3T.1336, 1380). Police seized a towel and two sixteen-ounce Pepsi-Cola bottles from the car (2T.1027, 1028). After the search of the entire car was completed, Hanton advised Johnson that if nothing showed up in the tests of the items seized, he would not hear from the police. If he heard from the police, there would be trouble (3T.1383, 2T. 999-1000). Johnson was then told by either Hanton or Charvat that he could return to his apartment (2T.1043).

The towel, later tested and found to be semen-stained (4T.2265), the Pepsi-Cola bottles and a carton of Lawson's milk, observed but not seized from the car (2T.1042-1043), were used in support of the probable cause alleged in an affidavit in application for a warrant to search the appellant's home shortly thereafter. The semen-

stained towel was admitted at trial (5T.2448), over objection, as State Exhibit 12. The State's only justification for this search was its claim that appellant consented to it (2T.963, 964).[6] On the basis of the alleged consent, the trial court overruled appellant's motion to suppress (3T. 1533).

A prosecutor has the burden of proving that consent was freely and voluntarily given. Bumper v. North Carolina, 391 U.S. 543 (1968). This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. Id. Schneckloth v. Bustamonte, 412 U.S. 218 (1973), teaches that in determining whether a claimed consent is in fact voluntary, voluntariness "is a question of fact to be determined from the totality of all the circumstances," Id., at 227. Schneckloth v. Bustamonte, supra, 412 U.S. at 229, mandates consideration of the "vulnerable subjective state of the person" who has allegedly consented. Moreover, courts must be especially alert for coercion, express or implied, no matter how subtle. Id., at 228.

Viewed in their totality, the facts here amount to nothing more than a tired

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[6] From the inception of the motion hearing, the prosecution's only justification for the search of the appellant's car at midnight on November 21, 1975, was its claim of consent by the appellant (2T.963, 964) and testimony was limited to that question by the trial court (2T.978).

and intimidated individual of slight stature who, awakened from sleep, uninformed of his rights and confronted by four armed police officers in the middle of the night, submitted to the demands of open and obvious police authority. As such, the only conclusion possible is that the State utterly failed to meet its burden of proving a free and voluntary consent, and the trial court's denial of appellant's motion to suppress was clearly erroneous. See Amos v. United States, 225 U.S. 313 (1921); Johnson v. United States, 333 U.S. 10, 68 (1948). Therefore, certiorari should be granted and petitioner's convictions should be reversed.

III.

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER PETITIONER'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS WERE DENIED BY THE INTRODUCTION OF EVIDENCE DIRECTLY DERIVED FROM THE ILLEGAL ARREST OF THE PETITIONER.

John Johnson was arrested without a warrant by Cleveland detectives on November 21, 1975, at approximately 7:00 p.m. while at work at a gasoline station (3T.1243, 1249, 1251, 1284). Detectives Murphy and Mulhull wanted Johnson to make a statement at the police station concerning his activities on November 20th (3T.1338). When Johnson told them he couldn't leave his job (3T.1338), he was arrested (3T.1249, 1251, 1284, 1338) and subsequently booked in connection with the disappearance of Melissa Hinke (3T.1255, see also 2T.949-951).

At the time of Johnson's arrest, all of the information possessed by the arresting officers Murphy and Mulhull related to an alleged attempt, the day before, to lure a girl named Kimberly Stephens into an auto on Eichorn Avenue (3T. 1241, 1257-1259), a mile and a half from where the victim was last seen (2T.1177). Detective Murphy had personally investigated the incident and had studied police reports (3T.1241). He knew that the girl was safe and had reported the incident to her parents (3T.1257-1258). He was also aware (3T.1241) that a Mr. Bosak had reported to police the license number of the auto involved in the Eichorn Avenue incident (listed to Johnson) and that Mr. Bosak described the driver of the car as having a full beard (2T.1192, 3T.1754). But Johnson had no beard.[7]

At the time of arrest, the police had no information to connect Johnson with the Hinke case. The midnight search of Johnson's car had yielded two pop bottles of a size different from those the victim had in her possession at the time of her disappearance (2T. 1001). The towel which was found in the car was tested on November 21st and, again, on November 22nd (4T.2265). But Detective Marisch testified that the police were not aware of the test results which showed a semen stain at the time of the arrest (2T.258). Marisch

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7/ The record indicated that the police first attempted to ascertain whether someone other than Johnson had used his car on November 20th, fourteen hours after Johnson's arrest, during interrogation (2T.932).

indicated that the police became aware of the results some time prior to taking Johnson's written statement (2T. 929-930, 958). Detective Koelliker also indicated that he was unaware of any test results seven hours after the arrest when he questioned Johnson (2T.1135-1136).

Immediately following his arrest, Johnson was taken to another gas station, at least a quarter of a mile away (3T.1263) to obtain the release of his car to the police (3T.1250). The car was subsequently towed (3T.1250) and searched at the police station (3T.1301, 1315). Johnson was taken to the police station (3T.1245) and questioned almost continuously (2T.1103, 3T.1253, 1348-1349) until 4:00 or 5:00 a.m. on November 22nd (3T.1348). The interrogation was interrupted once when Johnson was taken by police to a Lakewood address to obtain a key ring (3T.1287, 1300) which held a trunk key to Johnson's car (3T.1275) and a penknife (3T.1296).

With no more than two hours of sleep (3T.1349), nothing to eat (3T. 1356), and promises of being released (3T.1256, 1351, see also 5T.2512), Johnson made a written statement at 9:00 a.m. on November 22nd (2T.932, 3T.1255). After the statement was obtained, Johnson was not released (2T. 1111, 3T.1353), but was subjected to further questioning by another team of detectives (2T.1100-1101, 3T.1353-1354).

Evidence obtained from the searches of the car, the seizure of the key ring and the statements obtained during the

interrogation was admitted at the trial[8/] after the court denied the petitioner's motions to suppress (3T.1534-1536, 1542).

An arrest is invalid unless it is pursuant to probable cause. United States v. Watson, 423 U.S. 411, 415 (1976); Beck v. Ohio, 379 U.S. 89, 91 (1964). It is clear that the information available to the police at the moment of Johnson's arrest justified no more than a mere suspicion of the commission of any crime by Johnson, certainly not a sufficient basis to justify the arrest by Murphy and Mulhull in connection with the Hinke disappearance (3T.1249, 1254-1255).

Furthermore, evidence obtained as a result of an unlawful arrest must be suppressed unless the primary taint is sufficiently attenuated. Brown v. Illinois, 422 U.S. 590, 592 (1975); Wong Sun v. United States, 371 U.S. 471 (1963). Here, as in Brown, there was

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8/ Evidence derived from the searches of the car included testimony (4T.2216-2224, 5T.2371-2374) and State Exhibits 9-H, a blue sweatshirt (marked 3T. 1698 and received 5T.2447) and 20, 20A, 20B, photographs of the car (marked 4T.2217 and received 5T.1561, 1660-1675, 4T.1917, 1921, 2239-2243). State Exhibit 1, a penknife taken from the key ring (marked 3T.1558 and received 5T.2437). Evidence derived from the interrogations included testimony (4T.1916-1934, 2161-2168) and State Exhibit 13 and 13A, Johnson's written statement of November 22nd (marked 4T.1928 and received 5T.2448).

no intervening factor to attenuate the primary taint of the unlawful arrest, Brown v. Illinois, 422 U.S. 590, 592 (1975), nor was the arrest sufficiently distant in time to attenuate the taint. Id., at 603-604. Finally, as in Brown, the

> "[I]llegality here,..., had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledge, in their testimony, that the purpose of their action was for investigation or for questioning...' The detectives embarked upon this expedition for evidence in the hope that something might turn up." Id., at 605. (Emphasis supplied).

Here, the statements from the interrogations and physical evidence seized from Johnson's car flowed directly from - indeed, came fast on the heels - of the illegal arrest of Johnson. Accordingly, all statements of the petitioner obtained as a result of that illegal arrest should have been suppressed. Since they were not because the state courts' decisions on this question conflict with decisions of this Court, certiorari should be granted and petitioner's convictions reversed.

IV.

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER PETITIONER'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE WARRANTLESS SEIZURE OF PETITIONER'S AUTOMOBILE ONE QUARTER OF A MILE FROM THE PLACE OF PETITIONER'S ARREST, AND THE SUBSEQUENT WARRANTLESS SEARCHES OF THE AUTOMOBILE AND THE SEIZURES OF VARIOUS ITEMS WHICH WERE LATER INTRODUCED IN EVIDENCE.

Following John Johnson's arrest, he was taken in custody by the detectives from the Martin gas station where he worked to a Shell gas station, located at least a quarter of a mile away (3T. 1263). Prior to arresting Johnson, the detectives had determined that Johnson's automobile was parked at the Shell station (3T.1242-1243). Johnson's car was parked at the Shell station for repair of one of the windows in the car (3T.1339, see also 2T.968, 5T.2494-2495). The detectives drove to the shell station for the express purpose of seizing Johnson's car so that it could be searched (3T.1263-1264, 1266).

The detectives did not have a warrant to seize the car (3T.1251). Nor did they advise Johnson of his right to demand a warrant or to request the police not to tow the car (3T.1339). They never asked his permission to take his car (3T.1339), but simply told him they were going to tow the car (3T.1339) and thereafter the detectives ordered a police tow truck to take the car to the police pound (3T.1271).

Hours after the seizure of Johnson's car, warrantless searches of Johnson's auto were conducted by detectives at the pound during the early morning of November 22, 1975 (3T.1278, 1293, 1301) at approximately 2:00 a.m. (ibid.) and again later that morning, at approximately 9:00 a.m. (3T.1315), when a team of police from the Scientific Investigation Unit (3T.1317) searched for trace evidence of a crime of violence (3T.1313), at the request of the detective bureau (3T.1318-1319).

Among the items seized as a result of the searches was a blue sweatshirt with a minute spot of blood on it (4T. 2221-2222), taken from the trunk (3T. 1312). It was received into evidence at trial, over defense objection, as State Exhibit 9-H (5T.2447). Testimony also was offered that the search of the car revealed a small blood spot on the interior of the car (4T.2221).

It is clear that the courts below were in clear error in rejecting petitioner's arguments because the record demonstrates that none of the exceptions to the warrant requirement apply to this case.[9] Furthermore, it is certainly ture that "the word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." Coolidge v. New Hampshire, 403 U.S. 433, 461 (1971).

[9] In denying the petitioner's motion, the trial court held only that the police had a right to tow and search the car, without specifying the exception to the warrant requirement (Appendix at A58, 3T.1534).

The petitioner's auto was seized at least a quarter of a mile from where he had earlier been arrested (3T.1263). In light of Chimel v. California, 395 U.S. 752, 763 (1969), which restricted a search incident to arrest to the "arrestee's person and the area 'within his immediate control'," it can hardly be asserted that the seizure here was incident to a valid arrest. See also, Coolidge v. New Hampshire, supra, 403 U.S. at 456.

As a unanimous Court held in Preston v. United States, 376 U.S. 364, 367 (1964): "Once an accused is under arrest and in custody, then a search made at another place, without warrant, is seemingly not incident to the arrest."

Moreover, the record clearly shows that, unlike the Carroll-Chambers cases,[10] police had no probable cause to believe that the auto contained evidence relating to the crime for which the car was searched.[11] The information about the car, which the police had at the time

[10] E.g., Carroll v. United States, 267 U.S. 132, 158-159 (1925); Chambers v. Maroney, 399 U.S. 42, 47-48 (1970); Cardwell v. Lewis, 417 U.S. 583, 587 (1974); Texas v. White, 423 U.S. 67, 68 (1975).

[11] Petitioner was arrested in connection with the Hinke disappearance (3T. 1255) and the searchers were looking for trace evidence of a violent crime (3T.1313, 1315), clearly not descriptive of the alleged attempted abduction of Kimberly Stephens.

of the seizure, had been, for the most part, in their possession nineteen hours earlier when the first search of Johnson's auto occurred (3T.1257-1259) and related only to the alleged attempted abduction of Kimberly Stephens, who had never been in or ever touched the car involved in that incident (3T.1258).[12] As in Preston v. United States, 376 U.S. 364, 368 (1964), and Dyke v. Taylor Implement Mfg. Co., Inc., 391 U.S. 216, 221, 222 (1968), here there was no probable cause to believe that evidence of the crime was concealed in the auto.

Further, the exception exemplified by Carroll v. United States, 267 U.S. 132 (1925), Chambers v. Maroney, 399 U.S. 42 (1970), Cardwell v. Lewis, 417 U.S. 583 (1974) and Texas v. White, 423 U.S. 67, 96 S.Ct. 304 (1975), does not apply here. Warrantless car searches were permitted in this line of cases "because circumstances which furnish probable cause to search a particular car for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable." Chambers v. Maroney, supra, 399 U.S. at 51.

12/ At the time of arrest, the officers didn't know that the towel seized from Johnson's car at midnight on November 21st was stained with semen (2T.258, 1135-1136, see also 2T.929-930). All they knew, other than information concerning Stephens, was that a towel and two pop bottles, of a different size than those possessed by the victim (2T.1001), were seized from Johnson's car.

The instant case, like Coolidge v. New Hampshire, 403 U.S. 443 (1971), furnishes none of "the exigent circumstances" noted in the Carroll-Chambers line of cases.[13] Like Coolidge, id., at 461, Johnson had not resisted the police (4T.1902) when his car had been searched nineteen hours earlier in connection with the Hinke disappearance (2T.991); the car was not being used for an illegal purpose, but was undergoing repair at a gas station (3T.1339), the location of which the police were aware well in advance of Johnson's arrest (3T.1242). There were, in short, absolutely no circumstances to avoid the warrant requirement of the Fourth Amendment. See, United States v. Chadwick, 433 U.S. 1 (1977).

Nor can the seizure of the car and subsequent searches and seizures at the police pound be justified on the basis of consent. The Ohio Court of Appeals - Eighth District contended that Johnson's alleged consent to the midnight search of his car nineteen hours earlier continued to permit the seizure of the car subsequent to his arrest. Appendix at A24. The court of appeals' analysis ignored the plain facts that Johnson was under arrest at the time of the seizure (3T.1263). When the police saw Johnson's car, they ordered a tow (3T.1271). Johnson's permission to tow the car was never requested nor received (3T.1339). Johnson was also not informed that he had a right to a warrant (id.).

13/ See, e.g., Cardwell v. Lewis, 417 U.S. 583, 596 (1974).

The burden on the prosecution of showing consent, free from intimidation and duress, Bumper v. North Carolina, 391 U.S. 543 (1968), is particularly heavy where the individual is under arrest; non-resistance to orders or suggestions does not constitute consent. Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951); United States v. Rothman, 492 F.2d 1260 (9th Cir. 1974). The record here demonstrates nothing more than mere non-resistance while in custody, clearly not the free and voluntary consent required by this Court's decisions.

Having failed to prove an exception to the general requirement of a warrant, the State's warrantless seizure of Johnson's car and the subsequent warrantless searches and seizures of the contents of the car were clearly unconstitutional and the decisions of the courts below upholding the searches and seizures were in direct conflict with decisions of this Court. Certiorari should therefore be granted to resolve this question and petitioner's convictions should be reversed.

V.

AN IMPORTANT QUESTION IS PRESENTED WHERE AN AFFIDAVIT WHICH SUPPORTED THE ISSUANCE OF A WARRANT FOR THE SEARCH OF PETITIONER'S HOME FAILED TO SET FORTH FACTS TO SHOW THE BASIS FOR A NAMED INFORMANT'S CONCLUSORY STATEMENTS WHICH WERE NECESSARY TO ANY ATTEMPTED SHOWING OF PROBABLE CAUSE.

A night search of Johnson's home

was conducted on November 22, 1975, pursuant to a warrant issued earlier that day (2T.1141-1142). Among the items seized in the search of Johnson's apartment and admitted in evidence at trial was a pair of undershorts stained with blood (4T.2251-2253) which was received as State Exhibit 8-K (5T.2446), a wash rag found to have traces of blood (4T.2255) which was received as State Exhibit 25-E (5T.2452) and numerous photographs depicting the condition of the apartment and the position of various items at the time of the search which were received as State Exhibits 25, 25-A through 25-D (5T.2452).

Detective Volk, with the aid of Assistant County Prosecutor Garver, had prepared the affidavit (Appendix at A74) in application for warrant to search Johnson's apartment (2T.1141). Everything presented to the judge in support of the application for the search warrant was contained in the affidavit (2T.1146); on the affidavit alone, the judge issued the warrant (2T.1167). The affidavit set forth in the following two paragraphs the information provided to the judge in support of probable cause:

> "Affiant states that on November 20, 1975, the Cleveland Police Department commenced an investigation into the abduction of one MELISSA HINKE upon receiving a report from MRS. JANICE HINKE that her daughter MELISSA HINKE age 8 was missing her absence being unexplained. Affiant further states that during the course of said investigation, it was learned from one MR. BOZAK

that JOHN A. JOHNSON's 1968 Buick Ohio license number 350184 red body black vinyl top, was seen at or near the area where said MELISSA HINKE was last seen and that MR. BOZAK further observed the driver of the above described vehicle attempt to abduct a young female child the same having occurred at or near the time of MELISSA HINKE's disappearance. Subsequent investigation revealed that JOHN A. JOHNSON was the owner of the above described automobile. As a result of the above information, officers of the Cleveland Police Department went to JOHN JOHNSON's address at 2006 West Blvd., at which time JOHN A. JOHNSON allowed these officers to check his car. As a result of this cursory search, 2 Pepsi bottles, 1 carton of Lawson's milk in a bag, a towel which was analysed by the scientific investigation unit and found to have semen present.

"Affiant further states, that on November 22, 1975, the partially clothed body of MELLISA HINKE was found in a wooded area of the Cleveland Metropolitan Park-North Olmsted, Ohio with numerous puncture wounds of the upper torso and bleeding from the rectal area. Affiant further states, the body of MELISSA HINKE was conveyed to the county coroner's office by the Park Rangers."

Here, as in Spinelli v. United States, 393 U.S. 410 (1969), the information supplied by Mr. Bosak, the named informant, "has a fundamental place in this warrant application. Without it, probable cause could not be established." Id. at 414.

However, there are absolutely no facts or underlying circumstances detailed from which an independent magistrate could have concluded that an attempted abduction had taken place. The magistrate was left to rely solely upon Mr. Bosak's totally unsupported conclusion that he, in fact, had witnessed an attempted abduction.

Furthermore, the affidavit failed to set forth any factual basis to support the credibility of the informant or the reliability of his information. Certainly a mere name does not supply the basis to believe the credibility of the informant. The absence of a factual detailing of the basis for either the informant's conclusory statement, or the credibility of the informant or the reliability of his information should be fatal to the question of sufficiency of this affidavit. Aguilar v. Texas, 378 U.S. 108 (1964). Here, neither of the requirements mandated in Aguilar, supra, and Spinelli v. United States, 393 U.S. 410 (1969), are met.

Furthermore, the recital in the affidavit of the items found in the search of Johnson's car is completely without significance. There are no facts to establish that the items are material or relevant to establishing probable cause to believe that Johnson committed

a crime against the person of Melissa Hinke. Although the affidavit details that the victim's bloody body was found, the stains on the towel found in Johnson's car were from semen, not blood.

Most importantly, there are absolutely no facts or conclusions whatsoever in the affidavit to support a belief that evidence of a crime would be found in John Johnson's apartment. Indeed, the only facts set forth point solely to Johnson's car.

There can be no doubt, therefore, that the decisions of the courts below are in clear conflict with the decisions of this Court. Certiorari should be granted to review this question and petitioner's convictions should be reversed.

VI.

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER THERE WAS SUFFICIENT PROOF THAT FALSE STATEMENTS WERE INCLUDED IN A SEARCH WARRANT AFFIDAVIT BY AN AFFIANT WITH RECKLESS DISREGARD FOR THE TRUTH SO AS TO HAVE REQUIRED THAT THE SEARCH WARRANT BE VOIDED.

The affiant, Detective Volk, testified that he had prepared the affidavit in support of the warrant to search petitioner's apartment with the aid of an assistant prosecutor (2T.1141). Volk expressly testified that he reviewed all the police reports which were available when he prepared the affidavit (2T. 1147, 1151). Volk admitted that he knew

at the time that he drafted the affidavit that the location of the attempted abduction was on Eichorn Avenue and that Melissa Hinke was last seen at West 65th near Lorain Avenue, one to one and one-half miles from the scene of the attempted abduction. Volk was also aware that the attempted abduction on Eichorn Avenue occurred at 2:30 p.m., on November 20, 1975, but that Melissa Hinke disappeared sometime after 3:00 p.m., more than one-half hour later (2T.1178). However, none of these details were included in the affidavit. Instead, it was indicated that the attempted abduction occurred "at or near" the time and place of the victim's disappearance, creating the false impression that Melissa Hinke was the victim of the attempted abduction. The statement concerning the attempted abduction was essential to the establishment of probable cause (see Appendix at A73).

Volk reasonably should have been aware, simply by the disparity in time and location, that the victim of the reported attempted abduction was not Melissa Hinke. By drafting the affidavit to create the false impression that Hinke was the victim in the Eichorn incident, Volk demonstrated a reckless disregard for the truth.

Further evidence of Volks's reckless disregard of the truth in his drafting of the affidavit was supplied by his testimony that he had no personal knowledge of the informant Mr. Bosak or the manner in which Mr. Bosak's information was related to the police (2T.1150-1151, 1165); he received all his information from sources within the police department

(2T.1163). In fact, it is clear that at the time Volk prepared and signed the affidavit, he had no factual basis for a belief that Mr. Bosak was a credible informant or that Mr. Bosak's information was reliable (2T.1163-1166). Indeed, Volk didn't even know who originally contacted the police (2T. 1165, 1166), or through how many levels of hearsay the information had gone before it trickled down to him (2T. 1166).

Volk's claim that he didn't know the child's name who was involved in the attempted abduction on Eichorn Avenue (2T.1148), can be construed as another indicator of Volk's reckless disregard for the truth. However, his testimony in this regard is simply incredible, in light of his testimony that he reviewed all the police reports which were available on November 22nd (2T.1147, 1151) and also obtained information from other detectives (2T.1150). Newspaper articles published on the afternoon of November 22nd carried details of the attempted abduction and clearly indicated that a child other than Melissa Hinke had been involved (see, M. B. 3,4). Furthermore, Detective Murphy, a participant in the search with Detective Volk (2T.1141), testified that there were several reports on the alleged attempted abduction on Eichorn Avenue which were available on the afternoon of November 21st and Murphy had been able to review them at that time (3T.1241).

Franks v. Delaware, ____ U.S. ____, 98 S.Ct. 2674 (1978), clearly mandates that where a defendant establishes at an evidentiary hearing on the veracity

of statements in the affidavit that the affiant included false statements in an affidavit, either knowingly and intentionally, or with reckless disregard for the truth, and the false statement is essential to establish probable cause, the Fourth Amendment considerations require the voiding of the search warrant.

On the facts presented here, the lower courts' failures to follow the teaching of Franks denied petitioner his Fourth and Fourteenth Amendment rights and this Court should grant review and reverse petitioner's convictions.

VII.

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER PETITIONER MADE A VOLUNTARY, KNOWING AND INTELLIGENT WAIVER OF HIS PRIVILEGE TO REMAIN SILENT WHERE PETITIONER WAS SUBJECTED TO A LENGTHY, CONTINUOUS, NIGHT-TIME, CUSTODIAL INTERROGATION PRIOR TO MAKING ORAL AND WRITTEN STATEMENTS.

From the time of John Johnson's arrest at about 7:00 p.m. on November 21, 1975, until late the following morning, Johnson was, with few interruptions, subjected to incessant custodial interrogations by rotating teams of detectives (see, e.g., 3T.1245-1248, 1252-1253, 1272, 1293, 1342-1343, 2T.953, 1133, 4T.2315).

At 2:00 a.m., on November 22, 1975, Detectives Koelliker and Leppelmeier of the Homicide Unit began to question the appellant (2T.953, 1133). Although Koelliker asserted that Johnson was read his constitutional rights (2T.1130),

there was no signed writing, or any other record, which indicated that Johnson had been informed of his rights and had decided to speak to the detectives (2T.1132). Petitioner denied that Koelliker or Leppelmeier ever advised him of his rights (3T.1347).

Koelliker also claimed that Johnson was advised that he was being questioned in connection with the suspected murder of Melissa Hinke (2T.1134), even though, Koelliker agreed, the police had no knowledge that the girl had been murdered (2T.1134), and his written report did not mention any such advice to Johnson (2T.1135). Johnson did not remember being asked any questions about Melissa Hinke (3T.1347). He stated that he was questioned about his activities and whereabouts on November 20th (3T. 1347).

After two or three hours of questioning by Koelliker and Leppelmeier during the course of which Johnson was forced to strip naked (4T.2168), the interrogation ceased (3T.1348). Petitioner was taken to an occupied cell (3T.1349) at five or six o'clock a.m. (3T.1348). Johnson could not sleep because of the men milling around (3T.1349). There was no mattress, so he tried to sleep on the floor (3T.1409).

At approximately 8:00 a.m., Johnson was brought to an interview room (3T. 1248, 1349). Detectives Murphy and Marisch were present (2T.923, 3T.1249, 1279). Johnson testified that Murphy again told him that as soon as he made a statement he would be released (3T. 1351). This testimony was never refuted

and, in fact, was partially corroborated by Murphy who admitted that he earlier had stated that Johnson would be released as soon as he made a statement (3T.1256).

Johnson testified that he was not advised of the purpose of the statement (3T.1352, 1353, see also 2T.930). Johnson testified that he asked for an attorney but was told he did not need one because as soon as he was finished, he would be released (3T.1350). Detective Mulhull also had informed the petitioner's wife the previous evening that no attorney was needed and he would advise her when one was needed (3T.1282-1283, 5T.2504).

Although police suspect statements are headed by a paragraph setting forth the suspect's constitutional rights (2T.956), Johnson's written statement contained no such paragraph (2T.956). The absence was explained by Detective Marisch's blatant denial that Johnson had been arrested or that he was even a suspect in the Hinke case (2T.935, 3T. 1303), even though Murphy and Mulhull testified that they had arrested Johnson (3T.1256-1257), Johnson was booked in connection with the arrest in connection with the disappearance of Melissa Hinke by Marisch himself (2T.950), and the caption on the written statement indicated that it was in regard to the victim's disappearance (2T.942). In spite of these facts Marisch stated that Johnson was asked to make only a witness statement. Marisch admitted that witnesses are not advised of their rights prior to taking statements (2T. 957), but claimed that this time the petitioner was advised of his rights, orally, because of the "severity of the

matter" (2T.956-957),[14] a contradiction of the claim that Johnson wasn't even a suspect. Johnson did not remember ever being advised of his rights prior to the taking of the written statement (3T. 1353).

At trial, testimony was received from Detectives Koelliker (4T.2163-2167) and Marisch (4T.1929-1935) concerning the details of the whereabouts statements which Johnson made during the interrogation at 2:00 a.m. and 9:00 a.m. on November 22, 1975. The introduction of both statements of November 22nd allowed the prosecution to offer witnesses to destroy, point by point, the time which Johnson's statements indicated he spent at certain locations on November 20, 1975.

The oral statement was taken after Johnson had been questioned for almost seven hours (2T.1103, 3T.1253, 1348-1349). The written statement was obtained after Johnson had been allowed no more than two hours sleep (3T.1349), and nothing to eat since his arrest thirteen hours before (3T.1356). It is clear that:

> "[w]hatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not readily waive his rights. In these circumstances, the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege." Miranda v. Arizona, 384 U.S. 436, at 476 (1966) (emphasis supplied).

The Ohio Court of Appeals explained its rejection of petitioner's argument on this issue partially on the basis that "the challenged statements...were in substance consistently exculpatory" (Appendix at A15). However, this Court has expressly stated that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda v. Arizona, 384 U.S. 436, 444 (1966) (emphasis supplied). Furthermore, Miranda makes clear that the State bears the burden of showing that a defendant has made a voluntary, knowing, and intelligent waiver of the privilege to remain silent. Id. at 475-479. But the Ohio Court of Appeals applied solely the voluntariness of consent analysis, set forth in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), when it overruled petitioner's assertion of error.

In light of the clear failure of the Ohio courts to apply the correct

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[14] At trial, Marisch testified that prior to taking the written statement, he only asked Johnson "if he recalled his rights" (4T.1926).

standards to the claimed waiver of petitioner's privilege to remain silent, and the compelling facts of this case, this Court should grant certiorari and reverse the convictions.

VIII.

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER THE PETITIONER WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS WHERE, WHILE PETITIONER WAS BEING SUBJECTED TO LENGTHY, CONTINUOUS, CUSTODIAL INTERROGATION, THE INTERROGATING OFFICERS TOOK AFFIRMATIVE STEPS TO PERSUADE PETITIONER'S WIFE NOT TO SECURE COUNSEL FOR PETITIONER.

John Johnson was arrested for questioning in connection with the disappearance of Melissa Hinke (3T.1254-1255) and was continuously interrogated from the time of his arrest at 7:00 p.m. until the following morning (see, e.g., 3T.1245-1248, 1252-1253, 1272, 1293, 1342-1343). His wife went to the police station and met with detectives who were questioning Johnson (3T.1282-1283, 4T. 2504, 4T.2552). Detective Mulhull admitted that he told Mrs. Johnson that an attorney wasn't needed and that he would advise her when an attorney was needed (3T.1282-1283). Mulhull's testimony was corroborated by Mrs. Johnson (5T.2504). Detective Murphy testified that he advised Johnson's wife on the night of Johnson's arrest that as soon as Johnson made a statement, Johnson would be released (3T.1256, 5T.2512-2513).

Although Johnson was clearly arrested and booked in connection with the

disappearance of Melissa Hinke (3T.1256-1257, 2T.950), and although the continuous interrogation belies any claim that Johnson was a mere witness, detectives attempted to put Mrs. Johnson at ease concerning the need for an attorney. Their actions demonstrate a determination to prevent the one person who would have been able to contact an attorney from doing so. Their action is in direct conflict with the policies enunciated in Miranda v. Arizona, 384 U.S. 436 (1966), and Escobedo v. Illinois, 378 U.S. 478 (1964), to afford a suspect, who is the focus of a police investigation, the assistance of counsel. Both Miranda and Escobedo recognize that unfettered access to counsel is absolutely necessary to enable a suspect to fully protect his privilege to remain silent. The record in this case demonstrates that the police used the considerable pressure of isolation, continual interrogation and fatigue to wrest statements from the petitioner which could later be used to convict him. This Court should grant certiorari in order to address the important question presented here.

IX.

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE USE AT TRIAL OF A STATEMENT WHICH WAS OBTAINED AFTER INDICTMENT, IN THE ABSENCE OF COUNSEL AND AFTER PETITIONER HAD CLEARLY REFUSED TO MAKE ANY STATEMENT WITHOUT THE PRESENCE OF HIS ATTORNEY.

The petitioner was indicted on November 25, 1975, and arraigned on

November 28, 1975. Immediately after the arraignment, Johnson was rushed from the courtroom by Detectives Comodeca and Terpay to the interview room in the police station (2T.1086) for the purpose of further interrogation (2T.1077) as well as viewing for possible identification (2T.1092, 1093). Comodeca and Ferris were aware that following the arraignment, two attorneys were to be appointed to represent the petitioner (2T.1093, 1075). In spite of the imminent appointment of new counsel to represent the petitioner, Comodeca proceeded with the interrogation (2T.1087).

Detective Ferris entered the room between 10:30 and 11:00 a.m. (2T.1088, 1092). Both Ferris and Comodeca claimed that petitioner asked to talk to Ferris alone (2T.1077, 1088), but Johnson testified that Ferris came into the room and asked Comodeca if Ferris could talk to Johnson alone (3T.1360). Johnson stated that Ferris told him that everything could be "off the record" and that they didn't have to even talk about the case (3T.1361). Comodeca twice entered the room during the conversation between Ferris and Johnson (2T.1088, 1099). Although Comodeca claimed that Johnson made statements in his presence (2T. 1089), Johnson denied doing so (3T.1363), and the trial court so found (3T.1536-1538, Appendix at A60-61). Johnson testified that each time Comodeca entered the room, Ferris asked if Comodeca could listen to what was off the record, but he refused and requested an attorney before making any statements (3T.1362-1363). Ferris offered no testimony concerning Comodeca's return to the room.

Despite claims that Johnson was advised of his rights (2T.1067) and had waived them (2T.1068), Ferris admitted that on several occasions during the time they talked, Johnson stated that he would not make any statement without his attorney present (2T.1078), and that this refusal was not limited to written statements (2T. 1079). Johnson specificially denied that Ferris advised him of his rights (3T.1406), and maintained that Ferris said the conversation was "off the record" (3T.1362).

At 2:00 p.m., when the petitioner's appointed attorneys arrived, the conversation between Ferris and the petitioner ended. Ferris denied telling the petitioner's attorneys that it was a shame they had shown up, because "I would have gotten more out of him" (2T.1080). However, when Detective Comodeca was asked if he heard such a statement, he testified, "I don't know how to word it,...there was some--I can't recall" (2T.1098).

Police confiscated a grey sweatshirt (3T.1324) which had been brought from home by Johnson's wife (3T.1326) after Johnson indicated to Ferris that he had worn the sweatshirt on November 20th, the day of the victim's disappearance (3T.1324, 1372). The grey sweatshirt, found to have traces of blood on it, was subsequently marked (5T.2415) and received (5T.2455) in evidence as State Exhibit 32.

At trial, Ferris offered extensive testimony of Johnson's statements of November 28th (5T.2408-2416). The testimony included several highly incriminating statements allegedly made

by Johnson, including the statement that he was never in a fight that day but made up the story (5T.2411), that the sweatshirt he wore on November 20th was muddy and had blood on it from the waist to the chest and on the sleeves (5T. 2416) and that "when he took his trousers off, he saw his shorts were full of blood, and...he thought of the little girl" (5T.2409). Full text of this statement appears in Appendix at A63.

In Massiah v. United States, 377 U.S. 201 (1964), authorities surreptitiously elicited incriminating statements from a defendant in counsel's absence, after the defendant had been indicted for the crime to which the statement pertained. The Supreme Court held:

> "[T]he petitioner was denied the basic protection (of the right to assistance of counsel) when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." Ibid., 377 U.S. at 206.

Accord, McLeod v. Ohio, 381 U.S. 356 (1965).

Recently, this Court affirmed the teaching of Massiah in Brewer v. Williams, ____ U.S. ____, 97 S.Ct. 1232 (1977). In Brewer, this Court noted that Williams' statements that he would talk after he consulted with his attorney "were the clearest expressions...that he desired the presence of an attorney before any

interrogation took place," ____ U.S. ____, 97 S.Ct. at 1242. In the instant case, no clearer expression of the desired presence of an attorney could have been made by the petitioner when he stated several times (as admitted by Detective Ferris) that he didn't want to make any statement without an attorney present (2T.1078-1079).

This Court should grant certiorari and should reverse petitioner's convictions.

X.

AN IMPORTANT QUESTION IS PRESENTED CONCERNING ENFORCEMENT OF THE RULE ESTABLISHED IN MIRANDA V. ARIZONA THAT WHERE AN INDIVIDUAL INDICATES THAT HE WANTS AN ATTORNEY, THE INTERROGATION MUST CEASE UNTIL THE ATTORNEY IS PRESENT.

The record in this case is clear that on November 28, 1975, John Johnson requested to consult with an attorney before making any statements. Detective Ferris specifically admitted that several times during his questioning of Johnson on November 28, 1975, Johnson told Ferris that Johnson didn't want to make any statement without an attorney present (2T.1078-1079). The State produced no evidence to rebut this testimony; indeed, it could not.

The record shows that the interrogation of Johnson by Ferris lasted from two (2) to two and one-half (2 1/2) hours (2T.1079, 1088, 1092) and that Johnson's first request for an attorney would have

occurred just fifteen (15) minutes after the interrogation had begun, when Detective Comodeca entered the room (2T.1088). It is clear that Ferris should have immediately ceased the interrogation after Johnson made his desire for an attorney apparent.

Miranda v. Arizona, 384 U.S. 436 (1966), unequivocally dictates that the State must either immediately honor a request for the assistance of counsel or refrain from further questioning until counsel is obtained:

> "If an individual states that he wants an attorney, the interrogation must cease until an attorney is present." 348 U.S. at 474 (Emphasis supplied).

This Court's decision in Michigan v. Mosley, 423 U.S. 96 (1975), leaves little doubt that the rule enunciated in Miranda enjoys continued vitality. See Mosley, supra, fn. 7 and 10.

Petitioner urges this Court to grant certiorari to consider the clear and compelling facts of this question and to reverse his conviction.

XI.

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE ADMISSION OF TESTIMONY CONCERNING THE IN-COURT AND PRETRIAL, POST-INDICTMENT IDENTIFICATIONS OF THE PETITIONER WHEN THE PRETRIAL IDENTIFICATION OCCURRED IN THE ABSENCE OF PETITIONER'S ATTORNEYS.

On November 28, 1975, three days after petitioner Johnson had been indicted and on the same day of his arraignment, twelve-year-old Lisa Chambers was escorted by police to a room in the Cleveland police station where she was asked to look through a two-way mirror and identify John Johnson (2T.847, 892), in the absence of counsel for Johnson (2T.892-893, 1093). Lisa earlier had told detectives investigating the Hinke case about an incident which occurred on November 14th where a man had tried to entice her into his car by offering her a ride to school (2T.882).

Before viewing Johnson, detectives told Lisa that Johnson had tried to get another girl into his car and that he had already been identified by other children (2T.864-866). When Lisa looked through the mirror she saw a number of men she knew were detectives and uniformed police in the room (2T.862, 4T.1817). Johnson,

dressed in prison clothes (2T.862-863) and the only person who was not a police officer (ibid.), was seated in the room, surrounded by the older men (4T.1811).

At trial the State offered Lisa's testimony to prove an alleged prior act by Johnson pursuant to Ohio Revised Code §2945.59 (Appendix at A82) to prove Johnson's motive, intent, scheme, plan, etc. Lisa testified at trial about her police-station identification of Johnson as the man who offered her the ride (4T.1809-1810) and also made an in-court identification of Johnson (4T.1807-1809). Lisa's mother was also permitted to testify and buttress Lisa's pretrial identification of Johnson (4T.1825).

The introduction of testimony concerning the identifications denied petitioner his Sixth and Fourteenth Amendment rights. However, the courts below completely failed to address the obvious trial court error even though it was specifically brought to their attention (see e.g. Appendix at A45, 50). This Court has recently reaffirmed its holding in Gilbert v. California, 388 U.S. 263 (1967), that trial testimony concerning a pretrial identification, held in the absence of counsel, after the initiation of adversary judicial criminal proceedings, is subject to a per se exclusionary rule. Moore v. Illinois, ____ U.S. ____, 98 S.Ct. 458 (1978). Here, Lisa Chambers' testimony about the pretrial identification clearly should have been excluded.

Moreover, the in-court identification of Johnson by Lisa in light of the post-indictment identification was subject to the rule enunciated in United States v. Wade, 388 U.S. 218 (1967). The State completely failed to prove "by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification." United States v. Wade, supra, at 240.

Furthermore, the unnecessary suggestiveness of the pretrial identification procedure created a substantial likelihood of irreparable misidentification in violation of petitioner's due process rights under the Fourteenth Amendment. Manson v. Brathwaite, 432 U.S. 98 (1977). Petitioner urges this Court to accept review and correct the obvious and serious prejudicial error left unremedied by the courts below. This Court should grant certiorari and reverse petitioner's convictions.

CONCLUSION

This case arises out of ugly beginnings--a brutal and senseless death of a young child. It is a case in which the cry for vengeance is a natural response to the outrage of a frightened community and the frustrations implicit in society's continuing struggle to control criminal conduct.

It is precisely in such cases as this, however, that the interposition of constitutional protections and orderly process are most needed--and most sorely

tested. And so it is vital that each sordid case in which the provocation is mighty and the public outcry vast and unremitting--including this one--must evoke the most dispassionate analysis and thoughtful response of those charged with administering our system of criminal justice. For, "not the least significant test of the quality of a civilizations is its treatment of those charged with... offenses which arouse the passions of a community." Frankfurter, J., concurring in Irvin v. Dowd, 366 U.S. 717, 729 (1961).

Petitioner has demonstrated that from his first contact with police officers through his trial and sentencing, the protections of the law and the constitution guaranteed to all citizens were denied him. He was illegally arrested. His home and car were illegally ransacked by police. He was illegally detained and illegally interrogated. He was forced to stand trial in a community atmosphere in which the newspapers and television, and everyone exposed to them, were passionately conviced of his guilt and anxious for vengeance, before a juror was sworn or a word of testimony taken, and in a courtroom in which the poisonous effects of such publicity, on judge and jury, were readily apparent.

It remains for this Court to apply the rule of law to this case. Petitioner, therefore, respectfully urges this Court

to grant the writ of certiorari and accept this case for review.

Respectfully submitted,

BERNARD A. BERKMAN
BERKMAN, GORDON, KANCELBAUM,
LEVY and MURRAY
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 781-5245

Attorney for Petitioner

George W. Palda
J. Michael Murray

Of Counsel